DOCUMENT RESUME

ED 215 631 HE 014 995

AUTHOR Zirkel, Perry A.
TITLE Outcomes Analysis of Court Decisions Concerning Faculty Employment.
PUB DATE Mar 82
NOTE 24p.; Paper presented at the Annual Meeting of the American Educational Research Association (New York, NY, March 1982).

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Administrator Attitudes; *College Faculty; *Court Litigation; Due Process; Employment Practices; *Faculty College Relationship; Higher Education; *Legal Responsibility; Questionnaires; *Teacher Dismissal; Teacher Employment; Tenure; Trend Analysis

ABSTRACT

The outcomes of court decisions concerning faculty employment (e.g., nonrenewal and termination) during 1976-80 were evaluated, along with the level of knowledge among college and university officials about these judicial developments. The primary data source is the "Yearbook of Higher Education Law"; the secondary data source was a sample of 97 college and university officials from the southeast United States. Court decisions reported in four "Yearbooks" were classified according to the outcome of the case, status of the plaintiff, action by the institution, and legal basis of the suit. The 97 officials, who attended a 1981 conference on Higher Education and the Law, were administered an awareness questionnaire concerning judicial developments. Contrary to the common expectation of the administrator respondents, there has not been a dramatic growth of faculty employment decisions during the past five years. The overall level of cases has remained approximately the same. The total number of decisions averages about 40 to 45 per year. When the 40 inconclusive decisions are not considered, the overall results favor the defendant-institutions over the faculty-plaintiffs by over a 4-to-1 ratio. The respondents were evenly divided between those perceiving that the faculty had won and those perceiving that the institution had won the majority of cases. Approximately 40 percent of the decisions were based on nonrenewal and termination. The most frequent basis was procedural due process, based on the Fourteenth Amendment. A sample questionnaire is appended. (SW)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED215631

OUTCOMES ANALYSIS OF COURT DECISIONS CONCERNING FACULTY EMPLOYMENT

Perry A. Zirkel, Dean & Professor
Lehigh University School of Education

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☐ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

Perry A. Zirkel

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

Paper presented at the annual meeting of the American Educational Research Association, New York City, March 1982

HE 014 [redacted] 995

Outcomes Analysis of Court Decisions Concerning Faculty Employment

PERRY A. ZIRKEL, Lehigh University

ABSTRACT

In order to see if courts are as deferential as they say, the outcomes of their reported decisions concerning faculty employment (e.g., nonrenewal and termination) during 1976-80 were compiled and categorized. The analysis revealed that contrary to a common conception among administrators, the number of cases did not increase significantly over the five-year period, and the defendant-institutions prevailed over 4-to-1. Analyses were also conducted according to the status of the faculty-plantiffs, type of institutional action, and legal basis for the courts' decisions. The results complement traditional legal analyses to provide a useful perspective for administrators in higher education.

Nonrenewal, termination, and other decisions to infringe upon the employment status of faculty members are hard to make and effectuate. Faced with the potential costs and complexities of litigation, college and university administrators sometimes become paralyzed into passivity. Although a whole host of court decisions dating back to the turn of the century[1] have included strong caveats against judicial intrusions into academic affairs, particularly in decisions about faculty promotion and tenure, legal comentators[2] have expressed an apparent practitioners' perception that the courts have been less restrained and deferential in recent years.

The literature is replete with descriptions of relevant court decisions[3] and prescriptions for precise university policies and procedures[4] relating to faculty employment. However, there does not seem to be any available analysis of recent litigation with respect to outcomes — i.e., wins and losses. Such systematic data should supplement, not supplant, other forms of legal analysis and administrative activity.

Empirical techniques have been used to analyze various other aspects of education-related litigation. For example, there is extensive literature investigating compliance with and the impact of court decisions affecting education.[5] Other studies have examined the individual votes[6] and overall

---

[1]See, e.g., Hartigan v. Board of Regents of West Virginia University, 38 S.E. 698 (W.Va. 1901).

[2]E.g., Thomas J. Flygare, "Issues Related to Alleged Discrimination in Employment," The Law and Administrative Dilemmas, ed. by D. Parker Young (Athens: University of Georgia Institute of Higher Education, 1980), pp. 7-12; Paul E. Skidmore, "Some Practical Legal Observations Concerning the Recruitment and Retention of Faculty in Higher Education," Higher Education: The Law and Institutional Challenges, ed. by D. Parker Young (Athens: University of Georgia Institute of Higher Education, 1979), pp. 27-30.

[3]E.g., D. Parker Young and Donald O. Gehring, The College Administrator and the Courts (Ashville, NC: College Administration Publications, 1981).

[4]E.g., Perry A. Zirkel. "Avoiding Litigation in the Promotion and Tenure Process," Journal of General Education, XXX (1979), 275-281.

[5]Henry S. Lufler, Jr., "Compliance and the Courts," Review of Research in Education, ed. by David C. Berliner (Washington, D.C.: American Educational Research Association, 1980), pp. 336-358.

[6]E.g., Charles F. Faber, "The Warren Court and the Burger Court: Some Comparisons and Education-Related Decisions," NOLPE School Law Journal, X (1981), 30-60; Julius Menacker, "A Review of Supreme Court Reasoning in Cases of Expression, Due Process and Equal Protection," Phi Delta Kappan, LXIII (November 1981), 190.

outcomes[7] of Supreme Court cases concerning various educational issues. There have also been several studies assessing the level of knowledge among educators about court decisions affecting them.[8] None of these empirical analyses has focused on higher education.

Objectives

The primary purpose of this study is to determine if courts have been as active and antagonistic in deciding faculty employment cases during recent years as is commonly perceived. A secondary purpose is to assess the level of knowledge among colleges and university officials about these judicial developments.

Data Sources

The primary source for this outcomes analysis is the Yearbook of Higher Education Law, a handy and comprehensive compilation of court decisions published by the National Organization on Legal Problems of Education (NOLPE). Specifically, the "Employees" chapter in the five Yearbooks from 1977 to 1981 provided the basic source material for this study.[9] Virtually all reported court decisions concerning faculty employment each year are annotated in the aforementioned chapter of each Yearbook.

The parameters for selection of court decisions were as follows:

1) role group: court decisions centering on faculty members, not administrators or staff
2) context: court decisions directly in higher education, not elementary-secondary education or private industry

---

[7] E.g., Perry A. Zirkel and Robert Martin, "Public School Officials and the Supreme Court: A Box Score," American School Board Journal, CLV (1978), 43-44.

[8] E.g., J. Lufler, Jr., "Unintended Impact of Supreme Court School Discipline Decisions," Contemporary Issues in Education, ed. by M.A. McGehey (Topeka, KS.: NOLPE, 1979); Perry A. Zirkel, "A Test on Supreme Court Decisions Affecting Education," Phi Delta Kappan, LIX (1978), 521-523.

[9] The 1977 edition was written by D. Parker Young. The subsequent Yearbooks were edited by him. The authors of the "Employees" chapter in the four editions were, respectively; D. Parker Young, Robert D. Bickel, Thomas S. Biggs, Jr., N. Shelton Hand, Jr., and Thomas N. Jones. NOLPE is located at 5401 S.W. 7th Avenue, Topeka Kansas 66606.

3) content: those decisions based on alleged infringements upon employment after but not including selection and initial appointment

When further information was needed for a case, the court's official opinion was consulted in the appropriate reporter series.

The secondary data source was a sample (n = 97) of college and university officials from the southeastern region of the country, who attended the annual conference on Higher Education and the Law at the University of Georgia in August 1981. Of the 97 respondents, 75 were male and 22 were female. Virtually all of them had administrative responsibilities, with only 6% identifying themselves primarily as faculty members. As further specified in Appendix A, they were largely an experienced group (50% having 15 or more years of professional experience) with a notable amount of legal training (12%, for example, having a law degree).

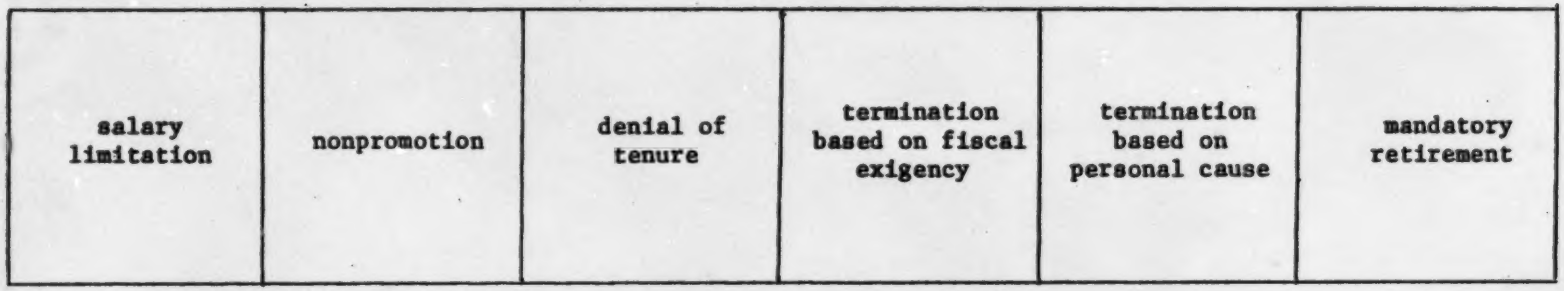
Method

With regard to the primary data source, court decisions reported in the four Yearbooks within the three abovementioned parameters were classified according to each of the following four variables: outcome of the case, status of the plaintiff, action by the institution, and legal basis of the suit.

With respect to outcome, the decisions were classified into three categories: decision for the faculty-plaintiff (+), decision for the defendant-institution (-), or inconclusive (I). "Inconclusive" decisions typically were preliminary rulings, such as denial of defendant's notion for summary judgment or remand for further deliberations at the trial court level.

With respect to status, faculty plaintiffs were identified as either nontenured or tenured. With respect to action, the cases were classified according to the continuum in Figure 1, which moves generally from less severe to more severe types of employment infringement. When more than one infringe-

FIGURE 1: CONTINUUM OF EMPLOYMENT INFRINGEMENT CATEGORIES



ment was alleged, the case was classified into the most severe of the alleged infringements. For example, is a faculty-plaintiff alleged sex discrimination with respect to salary level and promotional status, the case was classified into the "nonpromotion" category.

With respect to legal basis, the cases were classified into the following categories: Freedom of Expression or Association (Amendment I), Procedural Due Process (Amendment XIV), Age Discrimination (ADEA), Sex Discrimination (Titles VII or IX), National Origin or Race Discrimination (Title VII), and Other (e.g., breach of contract). If multiple legal bases were asserted, the case was classified according to the one or more bases discussed and determined by the court.

Frequency counts were made for the selection and classification stages within slightly different frames of reference. For the first stage, all reported decisions within the three parameters were included to arrive at a total frequency for each of the five Yearbooks. For the second-stage analysis, in which subtotals were derived for each of the classification variables, only the last decision was used for those cases which were reported in more than one of the five Yearbooks. Thus, for example, if a verdict was rendered for the defendant-institution at the trial court level, and then was reversed by an appellate court, only the latter decision was used for classification purposes.

With regard to the secondary data source, the conference attendees were asked to take a pre-test (Appendix B) to indicate what they thought the results of the primary analyses would be. This pre-test was administered as an awareness exercise at the beginning of a session on this topic, after a brief introduction to the aforementioned scope and classification. They recorded their responses to four demographic items and to the ten-item pre-test on an anonymous hand-in sheet (Appendix A). The sheets were collected at the conclusion of a 15-minute period, which was followed by a presentation on the court decisions to date.

Results

The 97 respondents, who were predominantly college and university administrators, attained a mean score of 2.9 (sd = 1.8) on the 10-item pre-test, based on 1 point for each correctly answered item. Thus, they had a generally inaccurate level of awareness of these judicial developments, achieving on an average only slightly above the score attributable to random selection on these 5-option items. Their specific results for each item are summarized in Appendix B and are reported below in tandem with those of the primary analyses.

In order to ascertain the overall pattern of the growth or nongrowth in the frequency of faculty employment decisions over the five-year period in question, the total number of decisions were initially counted for each Yearbook and were then re-counted according to the year of decision for a more accurate analysis. Although each Yearbook is focused on the decisions of the previous year, because of delays in publication of official reporters some cases decided late in one year are not covered until the Yearbook two years later. The respective totals are reported in Table 1.

It is obvious that, contrary to the common expectation (as expressed by 92% of the respondents who chose options A and B on pre-test item 1), there has not been a dramatic growth of faculty employment decisions during the past five years. As only 4% of the respondents correctly identified, the overall level has remained at approximately the same level with a rather regular up-and-down fluctuation, which is supprisingly symmetrical for the case count by year of decision. As correctly identified by 30% of the respondents (item 2 in the pre-test), the total averages about 40-45 decisions per year. Half of the respondents thought that the overall level would be significantly higher.

There may well have been dramatic growth in the period directly pre-

TABLE 1: TOTAL NUMBER OF DECISIONS PER YEARBOOK AND PER YEAR OF DECISION

Yearbook	N	Year of Decision	N
1981	43	1980	43
1980	40	1979	38
1979	55	1978	43
1978	30	1977	37
1977	48	1976	43
total	216	total	205
mean	43.2	mean	40.8

ceding 1976-80, including the 12 cases decided in 1975 which were reported in the 1977 Yearbook. The possibility of further growth in the immediate future does not, however, appear likely based on the current trend.

Upon isolating those decisions that had a seemingly conclusive and final outcome, the frequency count for the total sample and for the nontenured and tenured subsamples are reported in Table 2. As seen in the bottom line of this Table, when the 40 inconclusive decisions are not included, the overall results favor the defendant-institutions over the faculty-plaintiffs by better than a 4-to-1 ratio. As reported in item 3 of Appendix B, the respondents were evenly divided beteen those perceiving that the faculty had the edge and those perceiving that the ratio favored the institutions. Only 11% correctly identified the correct response option. As the Table also shows, the respective ratios for the two subsamples of faculty is virtually the same. The respondents were not far off in their estimates for nontenured faculty (see item 4 in the pre-test). However, only 9% identified the correct ratio for tenured faculty, with 70% of the respondents expressing the impression that tenured faculty suceeded in 50% or more of their cases (see item 5 in the pre-test).

As for type of institutional action, approximately 40 per cent of the decisions were based on nonrenewal (i.e., at the end of the contractual period) and termination (i.e., during the contractual period). Inasmuch as nonrenewal decisions always involve nontenured faculty and termination decisions often involve tenured faculty, the box scores for these faculty status and institutional action categories are largely overlapping and, thus, the latter results too redundant for inclusion here. The one type of institutional action that seems to merit reporting is nonrenewal (n = 5) or termination (n = 7) for the reason of fiscal exigency. The cumulative results of the decisions in the category are: faculty plaintiffs - 1; defendant institutions - 11. Although a majority of the respondents seemed to perceive a pro-institutional balance (see item 6 of the pre-test), only 7% correctly estimated the ratio obtaining at that time (0%-100%, the faculty having lost the 9

TABLE 2: OUTCOMES FOR TOTAL SAMPLE AND FOR TENURED AND NONTENURED SUBSAMPLES

	Total Faculty			Nontenured Faculty		Tenured Faculty	
	+	-	I	+	-	+	-
1981 Yearbook	7	25	11	4	16	3	9
1980 Yearbook	5	19	11	3	12	2	7
1979 Yearbook	10	35	8	7	22	3	12
1978 Yearbook	1	23	2	1	15	0	7
1977 Yearbook	7	29	8	5	23	2	6
Total	30	131	40	20	88	10	41
Percentage of all decisions	15%	65%	20%				
Percentage of conclusive decisions	19%	81%		19%	81%	20%	80%

decisions reported for 1976-79).[10]

The frequency of decisions involving the various legal bases are listed in Table 3. The data in Table 3 reveals that the most frequent basis asserted by faculty-plaintiffs is procedural due process, based on the Fourteenth Amendment. The respondents showed a largely accurate awareness of this item (number 7 in the pre-test), 68% selecting the correct option. As further revealed in Table 3, other frequent bases were Title VII sex discrimination cases, typically involving the Supreme Court's burden-shifting test in McDonnell Douglas[11] and First Amendment cases, typically involving the application of the Supreme Court's burden-shifitng analysis in Mt. Healthy.[12]

The outcomes analysis for the decisions involving each of these legal bases is provided in Table 4. Although procedural due process is the most frequently asserted basis, its success rate is low parallel to most of the other legal bases. First Amendment cases have yielded the most successful won-loss ratio for faculty plaintiffs, approximating better than one out of three. Only 5% of the survey sample correctly identified this response option in item 8 of Appendix B. The majority of the respondents selected procedural due process, whereas the proportion of faculty verdicts for this legal basis was only 9 per cent. It is also interesting to note that the only successful race or national origin discrimination case for the period was based on reverse

---

[10]The single faculty victory, as reported in the 1981 Yearbook, was D'Andrea v. Adams, 626 F.2d 469 (6th Cir. 1980), wherein a tenured assistant professor of geography gained a favorable verdict. The court ruled that a decision to terminate the geography program was in retaliation for his First Amendment-protected statements to state officials concerning university finances.

[11]McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); see also Furnco Construction Co. v. Waters, 438 U.S. 567 (1978).

[12]Mr. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

TABLE 3: FREQUENCY OF DECISIONS PER LEGAL BASIS

	Am. I	PDP	Age	Sex	NOD/Race	Other
1981 Yearbook	9	10	5	10	2/2	14
1980 Yearbook	9	11	2	6	1/2	6
1979 Yearbook	8	5	4	13	2/3	20
1978 Yearbook	9	8	0	8	2/3	4
1977 Yearbook	7	21	2	8	2/3	7
Total	42	55	13	45	9/13	51

TABLE 4: OUTCOME ANALYSES PER LEGAL BASIS

	Am. I		PDP		Age		Sex		NOD		Race	
	+	-	+	-	+	-	+	-	+	-	+	-
1981 Yearbook	3	3	0	7	0	4	1	4	0	2	0	2
1980 Yearbook	3	3	0	8	0	1	1	2	0	1	0	1
1979 Yearbook	3	4	0	4	0	2	1	9	0	1	1	1
1978 Yearbook	1	6	0	7	0	0	0	5	0	2	0	3
1977 Yearbook	2	4	4	16	1	1	1	4	0	2	0	3
Totals	12	20	4	42	1	8	4	24	0	8	1	10
Percentages	37.5%	62.5%	9%	91%	11%	89%	14%	86%	0%	100%	10%	90%

discrimination.[13]

Other Observations

Along with the numerical analysis of their results, other characteristics of these cases cannot be ignored. With regard to the cases collectively, the fundamental feature is the deference doctrine, which simply stated is that "federal courts should be loathe to intrude into internal school affairs."[14] This doctrine extends beyond the federal courts, as exemplified by the statement that "[n]either the [state] commission nor the courts should invade, and only rarely assume academic oversight, except with the greatest caution and restraint, in such sensitive areas as faculty appointment, promotion, and tenure, especially in institutions of higher learning."[15]

The exceptions are sometimes stated in terms of violations of the Constitution:

> It is not the function of a federal court to second-guess the decision of a school official on matters which do not rise to the level of a constitutional deprivation.[16]

Other courts point out that the exception extends to statutory violations, such as discrimination proscribed by the civil rights acts.[17] As option 9C in the pre-test accurately summarized, if there is no constitutional or statutory violation, courts generally adhere to a "hands off" philosophy, even if the

---

[13]Craig v. Alabama State Univ., 451 F.Supp. 1207 (M.D. Ala. 1978).

[14]Citron v. Jackson State Univ., 456 F.Supp. 3, 14 (S.D. Miss. 1977); see also Clark v. Whiting, 607 F.2d 634, 639 (4th Cir. 1979); Johnson v. University of Pittsburgh, 435 F.Supp. 1328, 1353 (W.D. Pa. 1977).

[15]Countiss v. Trenton State College, 392 A.2d 1205, 1208 (N.J. 1978).

[16]Cherry v. Burnett, 444 F.Supp. 324, 332 (D. Md. 1977).

[17]See, e.g., Powell v. Syracuse, 580 F.2d 1150, 1154, 1157 (2d Cir. 1978). Quaere whether EEOC's test validation requirements for Title VII cases have been ever applied to college and university faculty evaluation instruments or procedures (option 10C in the pre-test).

decision is patently based on "erroneous facts,"[18] and thus is "unsound or even absurd."[19]

An attempt to abjure the "hands off" philosophy with respect to sex discrimination,[20] seemed to have been largely rechanneled toward the mainstream of judicial thinking upon appeal to the Supreme Court. However, the subsequent decision in the Kunda case[21] may signify a divergence in this area. In any event option 10E in the pre-test would seem to be acceptably accurate.

With respect to the cases individually, the three R's that merit some attention are resources, reasoning, and remedies. An example of the extremes of the resource dimension is a sex discrimination suit against the University of Connecticut that entailed 12 sets of attorneys' 52 days of court time; 10,000 pages of transcripts; and 400 exhibits (option 9B in the pre-test).[22] As interesting illustrations of judicial reasoning, one state court recognized a common law right of fair procedure paralleling constitutional or contractual

---

[18] See, e.g., Citron v. Jackson State Univ., 456 F.Supp. 3, 15 (S.D. Mass. 1977).

[19] Smith College v. Massachusetts Comm'n Against Discrimination, 380 N.E.2d 121, 126 (Mass. 1978).

[20] Sweeney v. Keene State College, 569 F.2d 1169 (1st Cir. 1978), vacated and remanded, 439 U.S. 24 (1978).

[21] Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980).

[22] Lieberman v. Gant, 474 F.Supp. 848 (D. Conn. 1978), aff'd, 630 F.2d 60 (2d Cir. 1980). The record in Johnson v. University of Pittsburgh, 435 F.Supp 1328 (W.D. Pa. 1977), was even more extensive. Such resource allocations are not limited to the trial stage. See, e.g., Cornwall v. Ferguson, 545 F.2d 1022 (5th Cir. 1977) (30 volumes of transcripts at the stage of the university hearing); Lehman v. Board of Trustees of Whitman College, 576 P.2d 397 Wash. 1978) (1200 pages of transcripts at university hearing).

sources of procedural due process (option 9D),[23] and another court rejected the notion of a constitutional right of faculty to participate in retrenchment decisions (option 10B).[24] As for remedies, courts are generally stingy about awarding reinstatement to successful plaintiffs particularly if they are tenured faculty members (item 10A).[25] For example, attempts to achieve de facto tenure where universities have extended faculty contracts beyond the probationary period have led to more losses[26] than victories[27] for faculty plaintiffs (option 10B).

Even where faculty-plaintiffs have achieved victorious verdicts, the awards typically do not approach the level of automobile accident cases. In what seemed to be an extreme example contra, a federal district court in New York awarded over a million dollars in damages, attorney fees, and court costs (option 9A), but the second circuit vacated the judgment and remanded the case for corrected instructions to the jury.[28] On the other extreme is a national origin discrimination case in which attorney fees were awarded to the college (option 9E).[29]

---

[23]Ezekial v. Winkley, 572 P.2d 32 (Cal. 1977).

[24]Klein v. Board of Higher Educ., 434 F.Supp. 1113 (S.D.N.Y. 1977).

[25]See, e.g., Decker v. North Idaho College, 522 F.2d 872 (9th Cir. 1977); Pinkney v. District of Columbia, 439 F.Supp. 519 (D.D.C. 1977); Skehan v. Board of Trustees of Bloomsburg State College, 436 F.Supp. 657 (M.D. Pa. 1977); cf. New York Institute of Technology v. State Div. of Human Rights, 343 N.E.2d 498 (N.Y. 1976). The striking exception of the Kunda decision (note 21 supra) was "the first case in which a judicial award of tenure for a Title VII violation has been sustained." 621 F.2d at 547. However, the appellate court was split on this issue, and even the majority viewed the decision as "sui generis, or at least substantially distinguishable." Id.

[26]See, e.g., Grimm v. Gates, 532 F.2d 1034 (5th Cir. 1976); Kilcoyne v. Morgan, 405 F.Supp. 828 (E.D.N.C. 1975); Johnson v. Christian Brothers College, 565 S.W.2d 872 (Tenn. 1978); Grantham v. Rockhurst Univ., 563 S.W.2d 147 (Mo. App. 1978); Simon v. Boyer, 380 N.Y.S.2d 178 (Sup. Ct. 1976).

[27]See, e.g., Lucero v. Board of Regents of Northern New Mexico State School, 581 P.2d 458 (N.M. 1978); Sawyer v. Mercer, 594 S.W.2d 696 (Tenn. 1980); State ex rel. Chapdelaine v. Torrence, 532 S.W.2d 543 (Tenn. 1975).

[28]Selzer v. Berkowitz, 477 F.Supp. 686 (E.D.N.Y. 1979), vacated sub nom Selzer v. Fleisher, 629 F.2d 809 (2d Cir. 1960). Damages plus attorney's fees were awarded in Fisher v. Dillard University, 499 F.Supp. 525 (E.D. La. 1980).

[29]Kutska v. California State College, 564 F.2d 108 (3d Cir. 1977).

Concluding Caveats

This foray into legal realism was taken to extend not redirect our range of vision. Thus, an analysis of results should be combined with an analysis of reasoning. Beyond this balance, it is also understood that academic administrators must consider not only legal but also moral, political, and fiscal considerations.

It should be similarly recognized that these reported appellate decisions are only the tip of an iceberg. The recent costly settlements of class-action sex discrimination suite at Brown University[30] and the University of Minnesota exemplify the mass of material beyond the scope of this study.[31] The extent to which universities, as compared to faculty members, settle when they perceive their positions to be weak or costly affects the interpretation of the results of the study. Estimates of the frequency of such settlements remain -- in the absence of hard data — merely speculative.

Finally, this study is only preliminary. A tabulation of the results of corresponding decisions in the 10-20 years pre-dating the Yearbook is recommended. Other recommendations for further research include extending the scope of the analysis to decisions involving selection and appointment, to decisions initiated by nonfaculty college and university employees, and to decisions in basic education and private industry directly applicable to higher education. It would also appear worthwhile to intensify the focus of the analysis to include, for example, specific treatment of the "inconclusive" decisions and of the private-public instutional distinction,

---

[30]Perry A. Zirkel, "Avoiding Litigation in the Tenure Process," Journal of General Education, note 4 supra, at 276.

[31]Chronicle of Higher Education, Feb. 9, 1981, p. 10; Chronicle of Higher Education, July 27, 1981, p. 2.

The complementary and cautious use of this social science approach can make these important employment decisions "hard" in terms of firmness and fairness rather than in the sense of difficulty and complexity. These outcomes-oriented analyses complement the reasoning-oriented findings of traditional legal analysis, thus providing a useful perspective for the attitudes and actions of college and university administrators. They face difficult practical decisions yet reflect insufficient legal knowledge concerning faculty employment in this era of declining enrollments and inflationary costs.

APPENDIX A: HAND-IN SHEET

Please check below one box for each of the following demographic categories. Your name is not requested in order to assure anonymity.

1. **Sex**

   [77%] Male

   [23%] Female

2. **Years of professional experience**

   [7%] 0 - 4

   [20%] 5 - 9

   [23%] 10 - 14

   [16%] 15 - 19

   [16%] 20 - 24

   [18%] more than 25

3. **Current position**

   [5%] College or university president

   [35%] Other central office administrator

   [30%] Dean

   [4%] Department Chairperson

   [6%] Faculty member

   [5%] University staff attorney

   [2%] Outside counsel

   [13%] Other

   If you checked "Other please list your position here: _____

4. Primary formal, as compared to experential, source of legal knowledge:

   [12] Law degree

   [19] Course(s) in law in higher education

   [10] Course(s) in school law

   [37] Specialized conferences or workshops

   [25] Selected sessions at more general conferences

   [6] Other: readings (n = 4) *(list it here)*

Please list your answers to the attached Pre-Test by indicating the appropriate letter (A, B, C, D or E) for each item number below.

1. ____
2. ____
3. ____
4. ____
5. ____
6. ____
7. ____
8. ____
9. ____
10. ____

[N.B. Response distributions for the various items are listed in the left-hand margin of Appendix B]

APPENDIX B: AWARENESS PRE-TEST

1. What has been the overall pattern in the total numbers of reported court decisions concerning faculty employment (e.g., nonpromotion, nonrenewal, denial of tenure, and termination) for the four years 1976-1979?

51% A. dramatically mushrooming growth
41% B. gradual and steady increase
(4%) C. up and down but remaining approximately the same
2% D. moderate net decrease after erratic fluctuations
1% E. dramatic decline
1% NA

2. What is the average number of such decisions per year over the same period?

2% A. 10
15% B. 25
(30%) C. 45
18% D. 75
33% E. 100+
2% NA

3. As an average over the same period, what is the approximate percentage of verdicts for each side among those cases which have been subject to a seemingly final and conclusive decision?

5% A. faculty - 80%, institutions of higher education (IHE's) - 20%
35% B. faculty - 65%, IHE's - 35%
19% C. faculty - 50%, IHE's - 50%
29% D. faculty - 35%, IHE's - 65%
(11%) E. faculty - 20%, IHE's - 80%
1% NA

4. For the subset of these decisions which have involved <u>nontenured</u> faculty, what has been the respective ratio?

6% A. nontenured faculty - 80%, IHE's - 20%
14% B. nontenured faculty - 65%, IHE's - 35%
7% C. nontenured faculty - 50%, IHE's - 50%
28% D. nontenured faculty - 35%, IHE's - 65%
(43%) E. nontenured faculty - 20%, IHE's - 80%
2% NA

5. For the subset of these decisions involving <u>tenured</u> faculty, what has been the respective ratio?

21% A. tenured faculty - 80%, IHE's - 20%
35% B. tenured faculty - 65%, IHE's - 35%
20% C. tenured faculty - 50%, IHE's - 50%
12% D. tenured faculty - 35%, IHE's - 65%
(9%) E. tenured faculty - 20%, IHE's - 80%
3% NA

6. For the subset of these decisions which have involved loss of position due to fiscal exigency, what has been the corresponding box score?

4% A. faculty - 100%, IHE's - 0%
18% B. faculty - 75%, IHE's - 25%
8% C. faculty - 50%, IHE's - 50%
59% D. faculty - 25%, IHE's - 75%
(7%) E. faculty - 0%, IHE's - 100%
4% NA

7. Which legal basis was asserted most frequently in such suits?

6% A. First Amendment
68% B. Procedural Due Process (Am XIV)
19% C. Sex Discrimination (Titles VII and IX)
2% D. Race Discrimination (Title VII)
1% E. Age Discrimination (ADEA)
4% NA

8. Which legal basis has yielded the highest proportion of verdicts for faculty-plaintiffs in such suits?

5% A. First Amendment
55% B. Procedural Due Process (Am XIV)
33% C. Sex Discrimination (Title VII and IX)
6% D. Race Discrimination (Title VII)
0 E. Age Discrimination (ADEA)
1% NA

9. Which of the following statements, based on a review of the faculty employment decisions during the period 1976-80, is <u>least</u> accurate?

21% A. In a case involving a faculty member who was denied tenure for his association with the CIA, the court awarded him over a million dollars in damages, attorney's fees, and court costs.
5% B. In a sex discrimination case against the University of Connecticut, the trial involved 12 sets of attorneys, 10,000 pages of transcripts, and 400 exhibits.
30% C. Several federal courts have stated that it is not their role to set aside decisions of colleges and university administrators which may be unsound, ill-considered, lacking in compassion, simply erroneous, or even absurd unless there have been a violation of the Constitution or of federal legislation.
19% D. Aside from constitutional, statutory, and contractual due process clauses, there is also a common law right of fundamental fairness.
21% E. The courts have infrequently awarded attorney's fees to faculty members and have never awarded them to a defendant college of university.
4% NA

10. Based on a review of the same decisions, which of these statements is the <u>least</u> accurate?

16% A. Courts tend to be stingy about awarding reinstatement to victorious faculty-plaintiffs, particularly in denial-of-tenure cases.
31% B. Faculty members have a constitutional right to have input in retrenchment decisions at colleges and universities faced with fiscal exigency.
17% C. Although Title VII applies to institutions of higher education (IHE's) which receive federal funds, they have not been subjected to accompanying EEOC regulations which require validation data to support screening and evaluation instruments.
32% D. The clear majority of court cases in which universities have extended faculty contracts past the probationary period have not resulted in automatic, or de facto, tenure.
9% E. At least one federal circuit court of appeals has rejected the "hands-off" philosophy of judicial deference with regard to the decision-making process in academia.

5% NA